No. _____

In The
Supreme Court of the United States

ROBERT LEIGH STOLTZ,

Petitioner,

v.

COMMONWWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is due process violated where the judge instructs the jury such that even if the jury finds that the defendant knew the alleged victim (an undercover police officer) was not underaged, they still must convict him if there was any "reason to believe" that the victim was under the legal age?

LIST OF ALL PROCEEDINGS

- *Commonwealth v. Stoltz*, No. 2015-693, Fairfax Circuit Court. Judgment entered Feb. 17, 2017.

- *Commonwealth v. Stoltz*, No. 0352-17-4, Virginia Court of Appeals. Judgment entered June 19 2018.

- *Commonwealth v. Stoltz*, No. 181033, Supreme Court of Virginia. Judgment entered Aug. 1, 2019.

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The opinion of the Supreme Court of Virginia, App. 1, is published at 831 S.E.2d 164 (Va. 2019).

JURISDICTION

The Supreme Court of Virginia denied Stoltz's appeal on August 1, 2019. App. 1. This Court has jurisdiction under 28 U.S.C. §§ 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The United States Constitution's Fourteenth Amendment provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

On November 4, 2014, Detective Allbriton of the Fairfax County Police Department's child exploitation unit accessed Craigslist's section for adult-only 'casual encounters.' JA 275, 277.[1] The adult section classifieds require verification that the user is over age eighteen prior to accessing the ads. JA 275, 379. The detective initiated contact by replying to Stoltz's post titled, "Can I cum on you, quick shot and heavy load, male for female or man

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[1] "JA" refers to the joint appendix file in the Supreme Court of Virginia on direct appeal.

for woman, thirty-four, Northern Virginia." JA 279. The detective told Stoltz that he was "Annie" and thirteen years old several times. *See, e.g.,* JA 283. When it came time to exchange pictures, the detective sent Stoltz a photo of a 25-year-old Fairfax County Animal Control Officer, and Stoltz responded, "you're very cute." JA 285, 567. Allbritton asked for a photo of Stoltz and he sent a photo of the actor Joshua Jackson. Allbritton exclaimed "hee hee, you look like the guy from Mighty Ducks." JA 295, 411, 467. The film "Mighty Ducks" came out in 1992. JA 411, 420. Allbritton admitted that after about an hour of conversation he had no idea whether Stoltz believed he was a 13-year-old girl. JA 396. He agreed people sometimes lie about their age in the Craigslist personal section. JA 422.

Allbritton shifted the conversation to Yahoo Messenger using the email address lilannie133@yahoo.com. JA 274, 393, 403. Stoltz googled Littleannie133 and discovered that it had been used several times and in several forums since March of 2013, confirming his suspicions that he was being "scammed." JA 455-57, 461. "Annie" insisted on a phone call, so "Annie" attempted to call Stoltz three times, resulting in a phone conversation during which Detective Wagner a 39-year-old woman, spoke to Stoltz as "Annie." JA 299, 423. During the call Wagner said she was 13 years old and Stoltz laughed. JA 523.

The Detectives and Stoltz texted about meeting at a Wal-Mart. JA 285-86, 301, 303. Stoltz went to the Wal-Mart but never attempted to meet with "Annie." JA 314-15. As Stoltz left, Detective Allbritton stopped him and Stoltz gave permission to look through his cell phone and car. *Id.* The search

of Stoltz's car revealed no condoms, lubricant, or sex toys, despite the fact that "Annie" requested he bring condoms. JA 424-25, 446. Stoltz was released without further incident.

Stoltz was arrested a week later and was interrogated by Detective Allbritton. Stoltz maintained the he only sought an adult, knew the person he was communicating with was an adult, and thought the person was "scamming" him because of his discovery that "littleannie133" had been used for years. JA 455-61.

On July 20, 2015, Stoltz was charged with attempted indecent liberties with a minor and using a computer to solicit a minor. JA 1. The trial court denied Stoltz's pre-trial motion asking that the court dismiss the solicitation charge because the language of the statute—"knew or *had reason to believe*" the alleged victim was a minor—was unconstitutional.

In February 2016, the case was tried by jury and ended in a mistrial because the jury could not reach a verdict. JA 270. On October 31, 2016, another jury was impaneled. As with the first trial, Stoltz testified in his own defense consistent with what he told the detectives upon his arrest, and a recording of his conversation with the 39-year-old detective was provided to the jury.

During closing, the prosecution focused on "reason to believe." asserting that Stoltz had "reason to believe" Annie was 13 years old because the detective "told him 'she' was 13 years old." JA 839. The trial court denied Stoltz's proffered defense instruction asking to change "know or have reason to believe" to "to know or believe." JA 19, 642-44.

During deliberation the jury asked for clarification about the exact meaning of "had reason

to believe in the context of a minor or not . . . Specifically, does he have to find the reason credible in order to have reason to believe." JA 847. Defense counsel argued the reason must be a credible reason, but the court directed the jury back to the instructions. JA 848-49.

On November 3, 2016, the jury found Stoltz guilty of using a computer to solicit a minor and acquitted him of attempted indecent liberties with a minor. JA 856. After less than eight minutes of deliberation, the jury recommended the mandatory minimum sentence of five years. JA 876-77. The trial court denied Stoltz's subsequent motion for a new trial that argued the statute was unconstitutional. JA 22, 883-89. The trial court imposed the mandatory minimum five-year sentence. JA 30.

Stoltz filed a timely appeal and the Virginia Court of Appeals granted Stoltz's petition but on June 19, 2018, denied Stoltz's appeal. JA 33, 36-47. Stoltz petitioned the Supreme Court of Virginia, and that court granted Stoltz's petition but on August 1, 2018, denied his appeal. App. 1. The court found that the language "knows or has reason to believe" is "not ambiguous" and relied on the fact that a "multitude of federal courts have found similar language" constitutional. App. 1, slip op. at 7 & n.3.

SUMMARY OF ARGUMENT

Stoltz's due process rights were violated when the trial court instructed the jury such that even if the jury found that Stoltz knew the alleged victim was not underaged, they still must convict him if there was any "reason to believe" that the victim was under the legal age.

Because numerous state and federal courts across the country differ on whether strict liability is allowed in this context, this Court should grant certiorari to provide guidance to the lower courts.

REASONS FOR GRANTING THE PETITION

The lower courts need guidance on when strict liability is allowed to be imposed for serious criminal offenses**.** There exists a conflict between state courts of last resort and federal courts regarding the use of strict liability for serious criminal offenses. This is a substantial issue for which this Court should provide guidance, as it concerns substantial rights of the accused, arises frequently, and different courts are reaching different results.

ARGUMENT

Stoltz was charged with, *inter alia*, soliciting a child with a communications system, which provides that:

> It is unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he *knows or has reason to believe* is a child younger than 15 years of age . . .

Va. Code § 18.2-374.3(C) (emphasis added).

Typically, criminal offenses require both a volitional act and a criminal intent—a *mens rea*. Wayne R. LaFave, *Criminal Law* § 5.1, at 253 (5th ed. 2010). A statute imposes strict liability when it dispenses with *mens rea* by failing to "require the defendant to *know* the facts that make his conduct illegal." *Staples v. United States*, 511 U.S. 600, 606 (1994) (emphasis added).[2] This Court recently extended this rule in *Elonis v. United States*, 135 S. Ct. 2001 (2015), finding that for a statute prohibiting communication of threats in interstate commerce, the government was required to prove that the defendant *intended* to issue threats or *knew* that communications would be viewed as threats. *Id.* at 2011.

Virginia and Wisconsin are the only two states in the nation that criminalize internet solicitation of a child with a *mens rea* that fails to require that the defendant himself know, or at least believe that the "victim" is a minor.[3] Wisconsin uses "believes or *has*

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[2] *See also State v. Moser*, 884 N.W.2d 890, 896 (Minn. Ct. App. 2016).

[3] *See* Ala. Code § 13A-6-122 (2017); Alaska Stat. § 11.41.452 (2016); Ark. Code Ann. § 5-27-306(a)(1)-(2) (2016); Az. Rev. Stat. Ann. § 13-3560(A); Cal. Pen. Code § 288.2(a) (2016); Colo. Rev. State. Ann 18-3-306(1) (2016); Conn. Gen. Stat. Ann. § 53a-90a(a) (2016); De. Code Ann. Tit. 11, § 1112A(a)-(b) (2017); D.C. Code § 22-3010.02(a) (2017); Fla. Stat. Ann. § 847.0135(3) (2017); Ga. Code Ann. § 16-12-100.2(d) (2016); Haw. Rev. Stat. Ann. § 707-757 (1) (2017); Idaho Code Ann. § 18-1509A(1) (2017); 720 Ill. Comp. Stat. Ann. § 5/11-6(a-5) (2016), 730 Ill. Comp. Stat. Ann. § 5/11-6.6(a) (2016); Ind. Code Ann. § 35-42-4-6(b) (2017); Iowa Code Ann. § 710.10(1)-(4) (2017); Kan. Stat. Ann. § 21-5509(a)-(b) (2017); Ky. Rev. Stat. Ann. § 510.155(1) (2017); La. Stat. Ann. § 14:81.3(A) (2017); Me. Rev. Stat. Ann. Tit. 17, § 259-A (2017); Md. Code Ann.,

reason to believe," Wis. Stat. 948-075; and Virginia uses "knows or *has reason to believe*." Va. Code § 18.2-374.3(C). Wisconsin, however, has expressly recognized the constitutional infirmities that attach if the statute is applied as it was in Stoltz's case, and has interpreted its statute to prevent the unconstitutional application that happened here. *Stern v. Meisner*, 812 F.3d 606, 612 (7th Cir. 2016).

A jury empaneled for a soliciting a child case in Virginia is told that they merely need to find that a defendant had a "reason to believe" the victim is a minor, even if the defendant himself did not believe it to be true. As a result, Stoltz's jury was allowed to convict *even if they found that Stoltz believed* "Annie" was not a minor. Virginia's law thus runs headlong into the bedrock principle that an individual should not be convicted of a serious crime without a finding

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Crim. Law § 3-324(a)-(b) (2017); Mass. Ann. Laws ch. 265, § 26C (2017); Mich. Comp. Laws Serv. § 750.145d(1) (2017); Minn. Stat. Ann. § 609.352(2a) (2017); Miss. Code Ann. § 97-5-27(3) (2017); Mo. Rev. Stat § 566.151(1) (2017); Mont. Code Ann. § 45-5-625(1)(c) (2017); Neb. Rev. Stat. Ann. § 201.560(1) (2017); N.H. Rev. Stat. Ann. § 649-B:4(I) (2017); N.J. Stat. Ann. § 2C:13-6(a) (2017); N.M. Stat. Ann. § 30-37-3.2(A) (2017); N.Y. Penal Law § 235.22 (2017); N.C. Gen. Stat. Ann. § 14-202.3(a) (2017); N.D. Cent. Code § 12.1-20.05.1 (2017); Ohio Rev. Code Ann. § 2907.07 (2017); Okla. Stat. Ann. tit. 21, § 1123 (A)(1) (2017); Or. Rev. Stat. Ann. § 263.432 (2017), Or. Rev. Stat. Ann. § 263.434 (2017); 18 Pa. Cons. Stat. Ann. § 6318(a) (2017); 11 R.I. Gen. Laws § 37-8.8 (2017); S.C. Code Ann. § 16-15-342(A) (2017); S.D. Codified Laws § 22-24A-5 (2017); Tenn. Code Ann. § 39-13-528(a) (2017); Tex. Penal Code § 33.021(a)(1) (2017); Utah Code Ann. § 76-4-401(2) (2017); Vt. Stat. Ann. tit. 13, § 2828 (2017); Wash. Rev. Code Ann. § 9.68A.090 (2017); W. Va. Code Ann. § 61-3C-14b(a) (2017); Wyo. Stat. Ann. § 6-2-318 (2017).

that the defendant *himself* had a culpability justifying the stigma and punishment. *Morissette v. United States*, 342 U.S. 246 (1952); *Staples*, 511 U.S. at 614–15, 619; *Liparota v. United States*, 471 U.S. 419, 430 (1985); *Elonis*, 135 S. Ct. at 2012.

Virginia's statute violates due process because its *mens rea* requirement is no different from strict liability. The Virginia statute certainly is not a "public welfare" offense,[4] and in this case punished Stoltz even though he not only made an effort to ascertain the relevant facts, but did so successfully. Stoltz's conviction, therefore, is effectively one of strict liability because Stoltz had ample facts to determine—correctly—that "Annie" was an adult, including a picture and a conversation with an adult. But under the instructions given, because the detective stated that "Annie" was 13 years old, no matter how little credibility that assertion held, and regardless of the jury's belief that Stoltz recognized the statement as false, a conviction was assured because there existed some "reason to believe."

Predictably, the jury was confused given that Stoltz had overwhelming evidence that "Annie" was not a child but their given jury instruction did not seem to allow them to take that highly relevant fact into account. Thus, the jury asked the very question that Due Process requires: "does he have to find the reason credible in order to 'have reason to believe it?'" But instead of answering "yes," the Supreme Court of Virginia found not problematic that the trial court referred the jury back to the

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[4] In this case, Stoltz was charged with what is undoubtedly a serious crime, punishable by five to thirty years imprisonment.

unconstitutional instruction, and the jury convicted, and despite his correct conclusion he was held liable under the statute. *See Liparota*, 471 U.S. at 430 (reversing defendant's conviction because, pursuant to the rule of lenity, defendant was entitled to a jury instruction placing the burden of proof on the government to show he intended to commit food stamp fraud. Otherwise the application of the statute, with a *mens rea* of "know," would impermissibly impose strict liability on defendants).

Whether the constitution establishes limits on the use of strict liability in this context is a matter of dispute among the states and federal circuits.[5] As

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[5] *See, e.g.,* felony murder, *compare United States v. Parks*, 411 F.Supp.2d 846 (S.D. Ohio 2005) (upholding strict liability for felony murder) and *State v. West*, 862 P.2d 192, 205 (Ariz. 1993) (upholding strict liability), *with State v. Ortega*, 817 P.2d 1196, 1204-05 (N.M. 1991) (adopting intent-to-kill *mens rea* for felony murder), and *People v. Aaron*, 299 N.W.2d 304, 328–29 (Mich. 1980) (abrogating the felony-murder doctrine in Michigan); production of child pornography, *compare United States v. Reedy,* 632 F. Supp. 1415, 1422-23 (W.D. Okla. 1986) (upholding strict liability for producers with respect to the age of the performer), and *State v. Peterson*, 535 N.W.d 689, 691-92 (Minn. CL App. 1995) (upholding strict liability with respect to the age of the performer), *with* United States v. United States Dist. Court, 858 F.2d 534, 540–42 (9th Cir. 1988) (holding it unconstitutional to forbid a reasonable mistake of age defense), and *Outmezguine v. State*, 641 A.2d 870, 880 (Md. 1994) (holding that proof of knowledge of the minor's age is not an element of the offense, but permitting a mistake of age defense); driving under the influence, *compare State v. Luedtke*, 863 N.W.2d 592, 614 (upholding strict liability for operating a motor vehicle while having a detectable amount of a restricted controlled substance in the blood after applying rational basis scrutiny) (Wis. 2015), *with Carter v. State*, 710 So. 2d 110 (Fla. Dist. Ct. App. 1998) (holding that instruction on involuntary

noted above, this Court has suggested that the Constitution does place some unspecified limits on strict liability crimes. This case is an excellent opportunity for this Court to provide further clarification to the states.

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intoxication should have been given); providing false information, *compare City of Cuyahoga Falls v. Azodi*, No. 15643, 1992 WL 393151 (Ohio Ct. App. Dec. 30, 1992) (upholding strict liability in a statute prohibiting misidentification to a law enforcement officer investigating a traffic offense), *with Howard Gault Co. v. Texas Rural Legal Aid, Inc.,* 615 F. Supp. 916 (N.D. Tex. 1985) (finding strict liability with respect to falsity unconstitutional in a statute prohibiting picketing accompanied by false representations), *rev'd in part on other grounds*, 848 F.2d 544 (5th Cir. 1988); failure to register *compare People v. Patterson*, 708 N.Y.S.2d 815, 827 (Crim. Ct. 2000) (upholding strict liability as consistent with due process because the People must plead and prove "that defendant was given notice of his duty to register"), *with People v. Lopez*, 140 P.3d 106, 110 (Colo. App. 2006) (holding that mental state of knowingly is an element of the offense of failure to register); aggravated robbery *compare State v. Lester*, 916 N.E.2d 1038, 1044 (Ohio 2009) (finding that brandishing a deadly weapon element of aggravated robbery required no mens rea and thus imposed strict liability), *with State v. Jimenez*, 284 P.3d 640, 646 (Utah 2012) (holding that the use of a dangerous weapon element of aggravated robbery requires a mens rea of recklessness); drug distribution death *compare State v. Maldonado*, 645 A.2d 1165, 1188 (N.J. 1994) (upholding strict liability drug death provision), *with State v. Miller*, 874 N.W.2d 659, 664–65 (Iowa Ct. App. 2015) (declining to extend strict liability for death resulting from delivery of a controlled substance); possession of prison contraband *compare People v. Ramsdell*, 585 N.W.2d 1 (Mich. 1998) (holding that prisoner in possession of contraband is a strict liability crime), *with People v. Farmer*, 650 N.E.2d 1006, 1012 (1995) (holding that possession of contraband in a penal institution requires proof of "knowing possession").

CONCLUSION

The petition for writ of certiorari should be granted.

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